United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original + affidavit of mailing

77-6149

To be argued by
ELAINE C. BUCK

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

Docket No. 77-6149

SOLOMON COOPER,

Appellant,

—against—

CIVIL SERVICE COMMISSION,
APPEALS REVIEW BOARD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Eastern District of New York.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6149

SOLOMON COOPER,

Appellant,

—against—

CIVIL SERVICE COMMISSION, APPEALS REVIEW BOARD,

Appellee.

BRIEF FOR THE APPELLEE

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (George C. Pratt, *J.*) dismissing appellant Solomon Cooper's complaint (seeking relief from alleged age discrimination in federal employment) for failure to state a claim for which relief can be granted and for lack of subject matter jurisdiction. Judgment was entered by the Clerk of the District Court on August 26, 1977 in conformity with the Memorandum of Decision and Order of the district judge of August 25, 1977 (decision unreported) (A-37).[1]

Two issues are presented on appeal:

1. whether the district court was clearly erroneous in finding that the Internal Revenue Service's failure to

[1] References preceded by the letter "A" are to the appendix submitted by the appellee.

select appellant for the position of Revenue Representative was not because of appellant's age; and

2. whether the district court erred in finding that even if there was discrimination, it did not come within the purview of the Age Discrimination in Employment Act of 1967, as amended April 8, 1974, 29 U.S.C. § 633a.

Statement of the Case

On July 14, 1975, appellant filed a complaint with the Internal Revenue Service ("IRS") alleging that he had been illegally denied employment because of his age, to wit: the position of revenue representative, for which he claimed he had been interviewed in the Brooklyn district office on October 1, 1973, and the position of taxpayer service clerk, for which he was interviewed on December 6, 1973 (A-2-6). On October 24, 1975 IRS rejected appellant's complaint on the ground that, at the time of the alleged acts, the Age Discrimination in Employment Act of 1967 ("ADEA") had not yet been amended to protect federal employees (A-13).

On October 31, 1975 appellant appealed the IRS decision to the Appeals Review Board of the Civil Service Commission, claiming that although he had been advised on December 27, 1973 of his nonselection for the taxpayer service clerk position he had never been notified of the results of his October 1, 1973 interview for the revenue representative position (A-14-16). Therefore, he was, he maintained, still being denied that position on account of his age on May 1, 1974, the effective date of the applicability of ADEA to federal hiring (Id.).

On May 13, 1976 the Appeals Review Board affirmed the IRS decision on the ground that there was no evidence that appellant had been interviewed on October 1, 1973 for the position of revenue representative but that even if

he had, his complaint was not within the purview of the ADEA since complaints of discrimination can only be accepted and processed when the discrimination complained of occurred on or after May 1, 1974 or if there was an administrative or judicial proceeding pending on that date, which in his case there was not (A-17-21).

On June 8, 1976, appellant *pro se*, commenced this action under the ADEA, to reverse the Appeals Review Board's decision, to obtain the position of revenue representative, and for backpay (A-22-23). By motion filed on September 20, 1976 the appellee Civil Service Commission moved to dismiss the action for failure to state a claim for which relief can be granted and for lack of subject matter jurisdiction (A-24). On February 18, 1977 the district court held an evidentiary hearing on the appellee's motion to dismiss (A-29).

At the hearing, Roberta Hendler, a personnel staffing specialist at the Brooklyn district IRS office, who supervised hiring for the office's taxpayer service division (A-38), testified that, when IRS had a vacancy, its standard procedure was to request one or more certificates (lists of names) from the Civil Service Commission (A-39, 41); that it would request more names than it had actual vacancies (A-41); and that it would send telegrams to the names on the certificates (A-39). According to Ms. Hendler, responses were phoned in to one of the secretaries who would schedule an interview (A-39-40). If an individual failed to respond to a telegram the notation "FR" was placed by the name and that person did not receive further consideration (A-42-43). After all the selections were made and the nonselect letters sent, the certificates were returned to the Civil Service Commission (A-40).

With respect to appellant's application for the position of revenue representative, Ms. Hendler testified that an "FR" appeared on the certificate next to appellant's name

(A-43); that she had made the notation when she returned the certificates to the Civil Service Commission on February 26, 1974 (A-43-44, 69-72); and that the "FR" indicated appellant's failure to respond to the IRS telegram instructing him to call and schedule an interview (A-42-43). In a prior written statement, Ms. Hendler had reported that many of the documents relating to the interviews and applications for revenue representative were missing (A-8, 10). Ms. Hendler also testified at the hearing that all the positions for revenue representative were filled by November 26, 1973 (A-45-46, 65). Finally, Ms. Hendler testified that in 1973 IRS was hiring large groups of people for various jobs (A-40-41).

Nancy Costello, a personnel staffing specialist with the IRS in 1973 (A-47-48) and the person who appellant claimed he had called to schedule his interview (A-55), testified that during the period in question she had some responsibility for hiring (A-48); that she scheduled interviews, but not for the position of revenue representative (A-49); and that she did not recall speaking to or seeing the appellant (A-49).

Mark Bernstein, Chief of the Contact Section in the Brooklyn district office during the relevant time period (A-50) and one of the people who appellant claimed had interviewed him (A-56), testified that he sat on interview panels in substantially all of the hirings of revenue representative (A-50-51); that he did sit on an interview panel on October 1, 1973; but that he had no recollection of ever having seen appellant (A-52).

Marie Cox, a taxpayer service specialist in the Brooklyn district office (A-53) and another of the people who appellant claimed had interviewed him (A-56), testified that she recalled sitting on interview panels in October, 1973 with Ida Mason, now retired, and Mark Bernstein (A-53); that she did not remember interviewing appellant (A-53); and that she did not

recognize him as an individual whom they may have interviewed (A-54).

Appellant took the stand and testified that he had been interviewed on October 1, 1973 for the position of revenue representative and that he had never been notified of a decision regarding his application (A-55-56).

The district court, after considering the testimony and the documents submitted both before and at the hearing, found that appellant was interviewed for the position of revenue representative on October 1, 1973 but that he was "simply 'lost' in a bureaucratic morass rather than discriminated against" (A-33). The court also found that all the positions were filled by November 26, 1973 (A-35). Thus, even if an act of discrimination had occurred, it must have occurred prior to the effective date of the statute prohibiting age discrimination in federal employment (Id.) Therefore, the court ruled that it did not have jurisdiction of appellant's action under the Age Discrimination in Employment Act of 1967 as amended on April 8, 1974 (Id.). The Court also considered and rejected appellant's argument that the discrimination was continuing and thus covered by the act, holding that after November 26, 1973, appellee's failure to hire appellant was the result of no vacancies rather than age discrimination (A-35-36).

ARGUMENT

POINT I

The Internal Revenue Service did not discriminate against appellant because of his age.

On appeal, appellant claims that the decision of the district court rendered after a full evidentiary hearing should be reversed because the district court's finding

that appellant was a victim of bureaucratic oversight rather than age discrimination is not warranted by the evidence.[2]

It is axiomatic that where factual findings are challenged, they canot be set aside unless clearly erroneous. Fed. Rules Civ. Proc. Rule 52(a); *McAllister* v. *United States*, 348 U.S. 19, 20-21 (1954); *Pampillonia* v. *Concord Line, A/S*, 536 F.2d 476, 477 (2d Cir. 1976); *Carrion* v. *Yeshiva University*, 535 F.2d 722, 728 (2d Cir. 1976); and *Lasiter* v. *Fleming*, 473 F.2d 1374 (2d Cir. 1973).

In sharp contrast to appellant's detailed recollection of his October 1st interview for the revenue representative position, the evidence shows that when personnel staffing specialist Roberta Hendler returned the certificates to the Civil Service Commission on February 26, 1974 (A-43-44, 69-72), she entered an "FR" next to appellant's name to indicate that he had failed to respond to the telegram instructing him to call and schedule an interview (A-42-43). The evidence also establishes that some time prior to August 1975 many of the documents relating to this interview period were misplaced (A-8, 10). Finally, the evidence shows that during the relevant time period IRS was interviewing large groups of people for various jobs (A-). Based on all the evidence, the Court could and did conclude that while appellant was interviewed for the position of revenue representative—thus giving him a substantial benefit of the doubt—his application was never acted upon because IRS lost it.

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[2] The evidentiary hearing on appellee's motion to dismiss for failure to state a claim for which relief can be granted was authorized by Fed. Rules Civ. Proc. Rule 12(b).

POINT II

The district court lacked jurisdiction over appellant's action.

Appellant also claims on appeal that the district court erred in finding that even if he was discriminated against on the basis of his age, such discrimination was not within the purview of the ADEA.

The amendments bringing federal employees under the ADEA, 29 U.S.C. § 633a, apply to cases pending either administratively or in federal district court on May 1, 1974, the effective date of those amendments. *Bunch* v. *United States*, 548 F.2d 336 (10th Cir. 1977). See also *Brown* v. *General Services Administration*, 507 F.2d 1300, 1306 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976); and *Adams* v. *Brinegar*, 521 F.2d 129, 132 (7th Cir. 1975).

The evidence clearly shows that all the positions for revenue representative were filled on November 26, 1976 (A-45). The evidence also shows that the certificates, which are returned to the Civil Service Commission after IRS has filled its vacancies (A-40), were returned on February 26, 1974 (A-43-44, 69-72). Thus, the district court could and did find that even if there was discrimination it would have had to have occurred before the effective date of the amendments (A-35). Since it was undisputed that appellant did not file an administrative claim until more than 17 months after the effective date of the ADEA amendments (A-2), the court properly found that it lacked jurisdiction under the ADEA.

Based on the evidence that all the revenue representative positions were filled by November 26, 1973, the court also correctly rejected appellant's contention that the discrimination was of a continuing nature. Even if appellant had been denied employment because of his

age as late as the date that the last revenue representative was hired, any denial subsequent to November 26, 1973 was not because of appellant's age but because of a lack of job openings. *Powell* v. *Southwestern Bell Telephone Company*, 494 F.2d 485, 489 (5th Cir. 1974). Appellant's contention that there are job openings to this day—as evidenced by the fact that while IRS requested several lists of names from the Civil Service Commission, it only filled six positions—overlooks Ms. Hendler's undiscredited testimony that IRS routinely requested more names than it has actual vacancies (A-41). Similarly, appellant's contention that the revenue representative positions filled in 1973 are not legally filled because IRS failed to follow the required procedures for passing over appellant, a preference eligible, misses the point. Appellant was not passed over or rejected, rather, as the court properly found, he was "lost" in the "bureaucratic morass".[3]

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[3] Needless to say, there is no merit to appellant's claim that jurisdiction lies under 42 U.S.C. § 1983, a statute limited solely to the deprivation of civil rights by persons acting pursuant to color of state law. Nor is there any other basis for jurisdiction in the absence of a violation of ADEA. See *Brown* v. *General Services Administration*, *supra*, 425 U.S. 825-828.

CONCLUSION

The judgment dismissing appellant's action for failure to state a claim for which relief can be granted and for lack of subject matter jurisdiction should be affirmed.

Dated: Brooklyn, New York
December 6, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 6th day of December 1977 he served a copy of the within

Brief for the Appellee and Appendix

by placing the same in a properly postpaid franked envelope addressed to:

Solomon Cooper

One Parade Place

Brooklyn, N.Y. 11226

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores Byrd

Sworn to before me this

6th day of November 1977

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-[illegible]24
Qualified in Kings County
Commission Expires March 30, 1979